would be deemed granted if they are not acted on by state and local authorities within the specified time limit.

NAB/MSTV believe that, contrary to the conclusory statements of the commenters, the deemed granted provision does not raise particular constitutional concerns. As discussed *infra*, Section V, the Commission has ample authority to preempt certain state and local government restrictions on tower siting. To the extent that a particular state or local government is impeding the construction of federally-authorized broadcast facilities by, for example, refusing to act on a broadcaster's application, the Commission may preempt the particular state or local proceedings. Admittedly, this is a "draconian" solution, but in the event that a state or local government simply refuses to act on a broadcast application after allowing a "reasonable" period of time for such action, preemption of the local proceedings is entirely appropriate.

NAB/MSTV continue to believe that states and local governments must be encouraged to act within specific time frames. As shown above, the adoption of a "reasonable" limit based on the comments received in this proceeding would comport with typical local government procedures and should allow ample time for state and local governments to act on broadcast applications in the ordinary course of business. To the extent that such encouragement is needed, the "deemed granted" provision will serve as an incentive to state and local governments to act on broadcast applications. To the extent that such encouragement is not needed, state and local governments will simply follow their normal procedures in compliance with the "reasonable period of time" guideline.

The City of Dallas argues that this provision will sacrifice public health and safety concerns and will violate the "right to petition" state and local governments. Comments, at 17. The Concerned Communities and Organizations refers to the provision as "draconian" and argues that it is a "prescription for disaster." Comments, at 47.

C. Substantive Preemption

1. Environmental and potential human effects of RF radiation

The proposed rule would preempt state and local regulation of the environmental and potential human effects of exposure to RF radiation. Specifically, the proposed rule would preempt local regulation of the "environmental or health effects of radio frequency emissions to the extent that such facility has been determined by the Commission to comply with the Commission's regulations and/or policies concerning such emissions." The comments demonstrate that concerns over human exposure to electromagnetic energy are often a source of considerable local controversy and are often employed to delay and obstruct local proceedings.[53]

As shown by NAB/MSTV in their comments, the Commission has adopted comprehensive regulation of human exposure to RF radiation.[54] The Commission's environmental processing rules, 47 C.F.R. §§ 1.1301—1.1319, require broadcast applicants to perform the necessary analysis to ascertain whether a particular transmitting facility or device complies with the Commission's adopted RF exposure guidelines set forth in section 1.1307(b), in effect at the time the broadcaster files for an initial construction permit or renewal or modification of an existing license.

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[53] *See, e.g.,* comments cited at Section III.A.(4), *supra*. *See also* Comments of the Cellular Phone Taskforce, at 1-2; Comments of Ergotec Association, Inc., at 2.

[54] *See* Comments of NAB/MSTV, p. 11. *See also* Guidelines for Evaluating the Environmental Effects of Radio frequency Radiation, *Report and Order*, ET Docket 93-62, 96-326 (Released: Aug. 1, 1996) ("*R&O*"), *First Memorandum Opinion and Order*, FCC 96-487 (Released: Dec. 24, 1996) ("*First MO&O*"), *Second Memorandum Opinion and Order and Notice of Proposed Rulemaking*, FCC 97-303 (Released: August 25, 1997) ("*Second MO&O*"). The *Second MO&O* affirmed the Commission's decision to adopt limits for Maximum Permissible Exposure (MPE) and localized, partial-body exposure of humans based on criteria published by the National Council on Radiation Protection and Measurements (NCRP) and by the American National Standards Institute/Institute of Electrical and Electronics Engineers, Inc. (ANSI/IEEE). *See also* OET Bulletin No. 65 (Ed. 97-01).

Several state and local government parties concede that the FCC should continue to set national policy regarding RF radiation but argue that local governments should play a role in enforcing those standards. The County of Clackamus, Oregon, candidly states: "We have no problem with this type of preemption as long as applicants provide information verifying their facilities are in compliance with applicable FCC . . . requirements. These are areas which we do not have the expertise to review."[55] The Local and State Governmental Advisory Committee seems to presume federal authority but seeks a cooperative role for local governments in enforcing those standards:

> "While the Commission may continue to set national standards for radio frequency exposure standards. LSGAC and other state and local entities should work together with industry and the Commission, to reach consensus on reasonable steps that can be taken by local governments to ensure that the standards are met over time."[56]

Other local government parties demonstrate confusion as to whether they believe they should be entitled to regulate RF radiation or whether they simply seek power to enforce the FCC's RF standards. For example, the City of Philadelphia appears to argue that the Commission has no authority whatsoever to preempt local RF regulations of any stripe, stating that the Commission "has

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[55] Comments of Clackamas County, Oregon, at 2. *See also* Comments of City and County of San Francisco (the FCC should not prohibit local officials from monitoring compliance with RF emissions standards); Comments of Kern County, California, Planning Department, at 3 ("Local government is probably not the best level of government to address possible health and environmental impacts from RF emissions. While this agency supports a greater research effort to examine these possible impacts, such issues are best addressed at the federal or state level); Comments of Orange County, Florida, at 7 ("Orange County has no objection to this limited preemption."); Comments of King County, Washington.

[56] LSGAC Advisory Recommendation Number 8, at 4. *See also* Comments of The Cape Code Commission, at 7 ("In order to ensure compliance, local governments should be allowed to require HDTV providers to prove that the FCC's RF emission standards are met. We therefore urge the FCC to work with local governments to develop recommended RF compliance monitoring procedures that are fully responsive to the public's expressed concerns on RF safety issues.").

neither express no implied authority to preempt local laws that consider the effects of radio frequency emissions in tower siting decisions."[57] Later, Philadelphia states that local governments must retain a role with respect to monitoring compliance with RF radiation standards because "the Commission's own standards and procedures do not adequately address the concerns of the residents of the City."[58]

In any event, it is clear that the Commission does have power to preempt local regulation of RF radiation which is inconsistent with the federal standards. As shown below in Section V, the Commission has broad authority to adopt regulations in furtherance of radio communications services and may preempt state and local regulations which are inconsistent with these regulations.[59] Moreover, it is clear that the Commission could preclude state and local enforcement of federal RF radiation standards. Although it is true that the Commission's regulatory scheme with respect to human exposure to RF radiation is based on broadcaster self-certification, it is not true to say that the Commission does not "enforce" its RF radiation standards. As pointed out by NAB/MSTV, the FCC's self-certification has worked well for a number of years[60] and misrepresentation on an issue such as RF radiation is treated by the Commission as a very serious offense which can lead to fines or, possibly, loss of license — in addition to criminal penalties.[61] Again, the Commission is well

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[57] Comments of City of Philadelphia, at 38.

[58] *Id.* at 40.

[59] Such "inconsistent" regulations would include regulations that adopt a different technical standard for RF emissions as well as regulations which would allow a local government to deny a broadcast application because of perceived RF emissions effects, despite compliance with the FCC's RF emissions standards.

[60] There certainly is no evidence in the record to suggest that there have widespread abuses of this system.

[61] *See* 47 C.F.R. § 1.1413 (b) ("If any person shall in any written response to Commission correspondence or

within its federal prerogative to preempt state and local enforcement mechanisms which differ from the federal scheme.

NAB/MSTV continue to believe that the Commission should specifically prohibit any attempt by states and local governments to impose additional certification or paperwork requirements on broadcasters concerning RF emissions compliance beyond the present FCC requirements. The certification made by broadcasters with respect to compliance with RF radiation standards is required by the Commission to be made in every significant Commission filing, including applications for construction permits, facilities modifications and license renewals. These applications are available for inspection by the public in each station's public inspection files; therefore, the information regarding RF radiation compliance is already accessible to the public. Likewise, the Commission should reject attempts by state and local governments to impose additional requirements such as consultation fees and environmental assessment studies. The current FCC RF radiation guidelines are comprehensive and are adequate to apprise state and local governments of the environmental implications of broadcast construction applications.

Accordingly, NAB/MSTV believe that it is inappropriate for state and local governments to "reinvent the wheel" with respect to RF radiation standards and/or compliances. State and local governments that desire to ensure that a broadcaster is in compliance with applicable RF standards can simply examine the documentation supplied by the broadcaster in connection with its FCC authorization. To allow state and local governments a greater role would be a wasteful duplication

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inquiry or in any application, pleading, report, or any other written statement submitted to the Commission . . . make any misrepresentation bearing on any matter within the jurisdiction of the Commission, the Commission may, in addition to any other remedies, including criminal penalties under Section 1001 of Title 18 of the United States Code, impose a forfeiture pursuant to Section 503(b) of the Communications Act, 47 U.S.C. §503(b)").

of federal requirements.

2. RF interference

The proposed rule would preempt state and local regulation of RF interference ("RFI") issues. Specifically, the proposed rule would preempt state and local regulation of the "interference effects on existing or potential telecommunications providers, end users, broadcasters or third parties, to the extent that the broadcast antenna facility has been determined by the Commission to comply with applicable Commission regulations and/or policies concerning interference."

As the Commission concludes in its *Notice*, the Communications Act of 1934, as amended, comprehensively provides for regulation of RFI; therefore, a rule preempting state and local zoning regulations based on RFI would simply codify existing law.[62]

Several state and local government commenters express agreement with preemption of RFI regulations.[63] Very few of the commenting parties specifically address RFI issues, and no local government commenter puts forward a sustained argument against federal preemption of RFI. In this light, and for the reasons already cited by the Commission in its *Notice*, the Commission has comprehensively regulated the field of RFI and, therefore, should preempt contradictory state and local regulations of RFI.

3. Tower lighting, painting and marking; Aviation concerns

The proposed rule would preempt state and local "lighting, painting, and marking

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[62] *Notice*, ¶ 12. *See also Broyde v. Gotham Tower, Inc.*, 13 F.3d 994 (6th Cir.), *cert. denied*, 511 U.S. 1128 (1994) (affirming dismissal of nuisance suit based on RFI). *Accord Still v. Michaels*, 791 F. Supp. 248 (D. Ariz. 1992); *Blackburn v. Doubleday Broadcasting Co.*, 353 N.W.2d 550 (Minn. 1984); *In re: Appeal of Graeme and Mary Beth Freeman, et al.*, Docket No. 2:96-CV-295 (D. Vermont) (Aug. 11, 1997).

[63] Comments of King County, Washington; Comments of Clackamus County, Oregon; Comments of Orange County, Florida, at 7 ("Orange County has no objection to this limited preemption.").

requirements, to the extent that the facility has been determined by the Federal Aviation Administration ("FAA") or the Commission to comply with applicable FAA and Commission regulations and/or policies regarding tower lighting, painting and marking."[64] This rule is intended simply to preempt state and local regulations that impose requirements that differ from the lighting, painting and marking requirements adopted by the FAA and the FCC.[65]

Several state and local government commenters express agreement with the proposed preemption of tower lighting, painting and marking regulations.[66] Indeed, the vast majority of the commenters accept the notion of preeminent FAA jurisdiction over tower lighting, painting and marking. One party directly opposes the notion of federal preemption[67] and other commenters oppose this provision of the proposed rule upon the apparent misconception that it will allow the Commission to create its own lighting, painting and marking requirements which may or may not

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[64] *Notice*, at 18 (Appendix B).

[65] *See, e.g.*, 47 C.F.R. § 17.21, *et seq.* ("Subpart C: Specifications for Obstruction Marking and Lighting of Antenna Structures"). The FCC has incorporated standards for tower painting and lighting established by the Federal Aviation Administration ("FAA"). Pursuant to these rules, each new or altered antenna structure to be registered on or after July 1, 1996, must conform to the FAA's painting and lighting recommendations set forth in the structure's FAA determination of "no hazard," as referenced in the following FAA Advisory Circulars: AC 70/7460-1H, "Obstruction Marking and Lighting," August 1, 1991, as amended by Change 2, July 15, 1992, and AC 150/5345-43D, "Specification for Obstruction Lighting Equipment," July 15, 1988. *See* 47 C.F.R. § 17.23.

[66] *See, e.g.*, Comments of Clackamas County, Oregon, at 2 ("We have no problem with this type of preemption as long as applicants provide information verifying their facilities are in compliance with applicable . . . FAA requirements. These are areas which we do not have the expertise to review."); Comments of Orange County, Florida, at 7 ("Orange County has no objection to this limited preemption."); Comments of Seattle City Council, at 2 ("The City of Seattle would not oppose preemption where the FAA has established required tower marking and lighting for aircraft safety, as our regulations already defer to this agency."); Comments of King County, Washington.

[67] Comments of the National Business Aviation Association, at 8 ("[T]ower lighting and marking requirements are of direct interest to both state and local authorities. States can and may impose requirements in addition to those imposed by the FAA and which respond to unique local conditions.").

differ from the FAA's requirements.[68] This was not the intent of the rule. Indeed, the Commission's rules explicitly adopt FAA requirements.[69]

Other state and local government commenters as well as aviation interest groups raise concerns regarding potential preemption of state and local authority to regulate the siting of towers near airports or that otherwise might present a hazard to air navigation.[70] In general, these commenters oppose any effort to preempt state and local zoning and land use controls over potential hazards to air navigation. These commenters point out that the FAA does not have authority to prohibit construction that will present a hazard to air navigation, but that instead state and local governments are charged with regulating such construction.[71] These commenters are correct that the FAA does not have authority to prohibit construction, but they miss the fundamental point that FAA

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[68] *See, e.g.*, Comments of Kansas Department of Transportation, at 2 ("We believe that standards for marking, painting and lighting requirements required for the protection of aviation, should be under the exclusive jurisdiction of the FAA, with appropriate enforcement mechanisms in place, at the FAA, Commission and locally, to require that those standards be met. Consequently, our concern with this language arises with the use of the word 'or' in the quoted provision, and the suggestion that the Commission would be setting standards in this area and be given the authority to independently determine appropriate marking and lighting for the protection of aviation."); Comments of National Association of State Aviation Officials, at 2 ("Yet Paragraph II.7 of this rulemaking would allow the FCC to determine whether a request for the construction of a broadcast facility would 'comply with applicable tower lighting, painting and marking regulations or policies.' It is unacceptable that a commission which oversees telecommunications proposes to take over the FAA's responsibility of obstruction evaluation.").

[69] 47 C.F.R. § 17.22.

[70] *See, e.g.*, Comments of the National Business Aviation Association; Comments of the Kenton County Airport Board; Comments of the Commonwealth of Massachusetts Aeronautics Commission; Comments of the Kansas Department of Transportation; Comments of the Air Transport Association of America; Comments of the State of Michigan Department of Transportation; Comments of the Kentucky Airport Zoning Commission; Comments of the Northern California Airspace Users Working Group; Comments of the Experimental Aircraft Association; Comment of the State of Alabama Department of Aeronautics.

[71] The Concerned Communities and Organizations ("CCO") raises a slightly different concern. CCO points out the FAA obstruction review is limited to airports which are "available for the public use." *See* CCO Comments at 48 (citing 47 C.F.R. § 77.22(a)). Airports which are "available for the public use" are defined as airports which are "open to the general public with or without a prior request to use the airport." 47 C.F.R. § 77.2. Therefore, the FAA's hazard determination applies to all airports except for private airports which are not open to the public.

approval is a mandatory component of the FCC permitting process. The FCC will not issue a construction permit to a broadcaster that has not obtained an FAA "no hazard" determination.

While the proposed rule does not explicitly preempt state and local regulation of air safety, the record in this proceeding does recount instances where broadcasters have been subjected to multiple layers of review and proceedings concerning aviation issues. *See, e.g., Comments of Harry J. Pappas, Stella Pappas, and Skycom, Inc.; Comments of WLEX-TV, Inc; Comments of Cosmos Broadcasting Corporation; Comments of Butterfield Broadcasting and the Growing Christian Foundation.* For example, the permittee of WMMF-TV has been held up for eleven years because of concerns expressed by the aviation community regarding the proposed tower. *Comments of Harry J. Pappas, Stella A. Pappas, and Skycom, Inc.*, at 3-5. Station WAVE(TV), Louisville, Kentucky, reports that it took six years, including multiple hearings before the FAA and the Kentucky Airport Zoning Commission, as well as an appeal to the Kentucky Supreme Court, before it was able to obtain permission to construct its broadcast tower. *See Comments of Cosmos Broadcasting Corporation.*

There is no question that air safety is an important federal concern. Nonetheless, it does appear that broadcasters are subjected to inconsistent state and federal regulations concerning whether proposed construction presents a hazard to air navigation. To the extent that an FAA "no hazard" determination is made, it should not be second-guessed by state or local authorities. To the extent that the FAA does not regulate particular airports, states and local governments retain authority to regulate tower siting based on air safety concerns.

4. Aesthetics

Admittedly, regulation based on "aesthetic" concerns is a matter within traditional state and local authority. Nonetheless, the proposed rule would not allow restriction of broadcast transmission facilities based on aesthetic factors, standing alone.

NAB/MSTV continue to believe that it is inappropriate for state/local government bodies to regulate tower construction based solely on "aesthetic" factors. In other words, a state or local government should not be allowed to deny a construction application simply because the proposed facilities are not aesthetically pleasing. To allow this type of regulation would undermine the very purpose of adopting a preemption rule to facilitate broadcast facility siting. As stated by NAB/MSTV in their comments:

> "Obviously, the very nature of broadcast transmission requires towers that will be tall enough to provide required coverage. These towers cannot be disguised (like cellular and microwave transmitters) or miniaturized (like satellite dishes) or buried (like cables). In order to provide free television broadcasts to as many Americans as possible in a market-driven cost-effective manner, transmitting towers must, in some circumstances, be constructed where they may not appeal aesthetically to all local eyes. Failure to preempt local aesthetic regulations while preempting these other local actions may well result in a rash of new aesthetic ordinances implemented principally to evade the federal preemption of other state and local rules and regulations. In the end, failure to preempt purely aesthetic regulations will be an exception that swallows the rule. After all, "aesthetic" concerns are not capable of distillation to an objective standard; what to one person is an engineering marvel may be an eyesore to another."[72]

This is not to say that appearance does not matter and cannot under any circumstance be

[72] NAB/MSTV Comments, at 14.

taken into consideration by a local government. Certainly, state and local governments are, and will continue to be, well within their authority to establish land use plans which would discourage adjoining, inconsistent uses and zoning districts where nonconforming uses such as businesses, manufacturing facilities and even towers are strictly regulated. Contrary to the fears of some state and local government commenters,[73] a narrowly-targeted preemption of aesthetics will leave state and local governments with their full arsenal of traditional regulatory authority; however, they will not be able to deny a construction application solely on the basis that the proposed tower is "ugly."

5. Environmental issues

Numerous parties object to preemption of state and local environmental regulations. In particular, many citizens and government officials from the State of Vermont object to any preemption of state and local environmental authority. On the other hand, the Named State Broadcasters Associations argues that the proposed rule should be broadened to preempt state and local restrictions based on environmental issues.[74]

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[73] The City and County of San Francisco cites the following example which misconstrues the intent of the proposed rule:

> "[I]f a broadcaster proposed to build a 900 foot tower on a vacant lot next to the San Francisco Museum of Modern Art, the New Main Library or even City Hall, City officials would be unable to reject the proposal on the grounds that the proposed use would be inconsistent with the existing land uses in the area, as set forth in the City's general plan. Likewise, the City would be unable to invoke land use policies adopted to preserve the City's skyline. Under the Proposed Rule, such aesthetic considerations would be deemed irrelevant."

Comments of the City and County of San Francisco, at 16

[74] Comments of Named State Broadcasters Associations, at 10 and Exhibit A. Specifically, the NSBA seeks preemption with respect to "any environmental matter involving officially designated wilderness areas, wildlife preserves, threatened or endangered species wildlife habitats, historical sites listed or eligible for listing in the National Register of Historic Places, Indian religious sites, 100-year floodplains as determined by the Federal Emergency

The proposed rule does not specifically preempt state and local environmental regulations. As discussed above, the proposed rule would require that state and local regulations be justified with reference to health and safety concerns and balanced with reference to federal policy. NAB/MSTV agree that state and local environmental regulations should not be preempted by the proposed rule.

Nonetheless, NAB/MSTV also believe that broadcasters should not be required to undergo needless environmental review. In particular, the comments vividly demonstrate that environmental impact statement ("EIS") requirements add tremendous time and expense to broadcast facility siting applications. The procedural constraints proposed herein should effectively prevent this sort of "endless" environmental review. Where particular environmental review requirements will cause a state or local government entity to exceed the procedural time limit set for decision making under the proposed rule, an applicant should be able to "force" state/local action either through the "deemed granted" provision or potentially an action for mandamus filed in the local courts. In either case, the procedural constraints proposed herein are crucial to a broadcaster's ability to circumvent environmental procedures that are employed by NIMBY proponents seeking to obstruct and delay broadcast applications.

D. The Balancing Test

The proposed rule contains a "balancing test" clause which allows state and local regulations

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Management Agency ("FEMA") flood insurance rate maps, significant changes in surface features (such as wetland fills, deforestation or water diversion)." This list tracks the NEPA checklist required by the Commission's environmental processing rules, 47 C.F.R. §§ 1.1301-1.1319.

to the extent that they are reasonable in light of the federal interests at stake. In particular the proposed rule provides that any state and local regulation:

> "that impairs the ability of federally authorized radio or television operators to place, construct or modify broadcast transmission facilities, is preempted unless the promulgating authority can demonstrate that such regulation is reasonable in relation to: (i) a clearly defined and expressly stated health or safety objective other than one related to those set forth in Section (1)(i)-(iii) above [i.e., RFR, RFI, and lighting, painting and marking]; and (ii) the federal interests in (i) allowing federally authorized broadcast operators to construct broadcast transmission facilities in order to render their service to the public; and (ii) fair and effective competition among competing electronic media."

This provision is the subject of considerable opposition from state and local government commenters. Specifically, many commenters argue that the requirement that state and local regulations be related to "health or safety" objectives will effectively eliminate local control over the placement of broadcast towers.[75] Several commenters engage in a *reductio ad absurdum* analysis of this provision, arguing that under its "overly broad" formulation even local building codes will be preempted.[76] Certainly this was not the intention of the proposed rule, as several commenters recognize.[77]

It does appear that the "balancing test" provision should be amended to more specifically define the scope of the traditional land use authority which is retained by state and local governments. Specifically, the provision should be amended to provide that state and local

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[75] *See, e.g.*, Comments of City of Dallas, at 25-26

[76] *See, e.g.*, Comments of City of Philadelphia, at 8 ("On its face, this includes [preemption of] building, fire, and electrical code regulation ...")

[77] *See* Comments of CCO, at 51.

regulations which are related to "health, safety or general welfare" objectives are permissible. The addition of "general welfare" to the enumeration of permissible state and local regulatory objectives would encompass general zoning and land use regulations (as well as building code regulations) that form the backbone of traditional state and local authority. As discussed above, however, aesthetics should be explicitly carved out to the limited extent that a facility may be denied based on aesthetic considerations alone. This can best be accomplished by adding a new section (b)(1)(iv) which provides that state and local governments cannot deny a broadcast siting application on the basis of "the appearance of the broadcast transmission facility."

Other commenters object to the requirement that permissible objectives be "expressly stated."[78] It was not the intent of this proposed rule that state and local governments be required to rewrite local ordinances. In this regard, the "balancing test" clause should be revised to provide that the health, safety or general welfare purpose of the regulation must be "expressly stated in the text, preamble or legislative history of the restriction or are described as applying to that restriction in a document that is readily available." *See* 47 C.F.R. § 1.4000(b)(1) (using similar language in connection with the determination of a permissible purpose for restrictions impairing reception of television broadcast signals, direct broadcast satellite services or multichannel multipoint distribution services). Finally, other commenters argue that the "balancing test" clause improperly places the burden of proof with regard to permissible state and local regulations on the state or local government.[79] NAB/MSTV believe that this concern is valid and can be addressed by revising the

[78] *See, e.g.*, Comments of City and County of San Francisco, at 17; Comments of City of Dallas, at 27-28; Comments of CCO, at 48-51.

[79] *See, e.g., id.*

operative language as follows: " . . . is preempted unless ~~the promulgating authority can demonstrate that~~ such regulation is reasonable in relation to . . ."

E. Review Of State And Local Decisions

The proposed rule contains an alternative dispute resolution ("ADR") procedure which would allow aggrieved applicants to elect to have its request submitted to an ADR process administered by the Commission. Several state and local government commenters object to this proposal on the grounds that it would interfere with established administrative and judicial review procedures.[80]

On the other hand, several state and local government commenters acknowledge the benefits of ADR procedures.[81] The Local and State Governmental Advisory Committee, while not explicitly agreeing with the ADR provisions of the proposed rule, advocates that the "Commission [] make its staff available to work closely with local reviewing authorities . . . [in order to] facilitate communication between the local reviewing authorities, and any federal agency that may have information that would facilitate the local review process . . ."[82]

NAB/MSTV continue to believe that the Commission should utilize ADR procedures in order to resolve tower siting disputes. As NAB/MSTV pointed out in their comments, adoption of ADR procedures would further explicit federal (and Commission) policies favoring ADR

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[80] *See, e.g.*, Comments of the City and County of San Francisco, at 18; Comments of Jefferson County, Colorado, at 9; Comments of the City of Dallas, at 29; Comments of CCO, at 53.

[81] *See, e.g.*, Comments of the City of Dallas, Texas; Comments of the Seattle City Council; Comments of Clackamus County, Oregon; Comments of Plain Township, Stark County, Ohio; Comments of Addison County Regional Planning Commission

[82] LSGAC Advisory Recommendation Number 8, at 4

procedures. Nonetheless, the state and local government commenters have raised valid concerns regarding the mandatory nature of ADR procedures. Accordingly, NAB/MSTV believe that the proposed rule should be revised to provide that ADR procedures may be employed with the agreement of both sides to the dispute. Further, NAB/MSTV believe that the LSGAC's recommendation that the Commission assign staff to serve in an consultative or "ombudsmen" role with respect to siting disputes is sound and should be implemented.

F. Scope of the Proposed Rule

Broadcasters generally support extending preemption to all broadcasters, while the state and local government commenters generally oppose extending the scope of the rule beyond DTV-related construction.

NAB/MSTV continue to believe that the preemption rule adopted by the Commission should extend to all broadcasters. As aptly noted by one commenter, "Time delays and unreasonable denials of conditional use permits are problems common to all broadcasters, not just those seeking to deploy DTV services. . . [C]ommunities opposing the construction of new tower sites do not, as a general matter, distinguish between the type of service being provide."[83]

As argued by NAB/MSTV in their comments, certainly the benefits of any substantive preemption (i.e., preemption over specific areas of regulatory authority) adopted by the Commission should extend to all broadcasters.[84] Moreover, failure to adopt uniform preemption will likely lead to protracted and unproductive disputes concerning whether a particular project is "DTV-related":

[83] Comments of Polnet Communications, Ltd., at 4.

[84] NAB/MSTV Comments, at 7-10.

> "[T]he transition to DTV will require every television broadcaster to undertake construction activity of some type in order to install digital transmitters and antennas. According to NAB/MSTV estimates, 66% of all existing television broadcasters will require new or upgraded towers in order to support DTV services. This translates into about 1000 towers that will need to be constructed or upgraded in the conversion to DTV. In connection with this construction, NAB/MSTV expect that hundreds of FM antennas will have to be relocated.[85] The end result is that the conversion to DTV will cause 'ripple' effects throughout the broadcast industry, as the placement of a DTV antenna causes the relocation of an FM antenna, which causes the displacement of a third antenna at another location. FM broadcasters should not have to 'prove' that a particular relocation is 'caused' by the transition to DTV in order to benefit from the procedural requirements of the preemption rule."[86]

While it is true that the Commission's DTV build-out requirements underscore the need for a rule which preempts burdensome and duplicative state and local government regulations and procedures, this need is shared by all broadcasters, whether they are implementing DTV or not.

G. Regional Planning Agencies

A few state and local government commenters raise a discrete issue with respect to a few federally-approved regional planning agencies. *See Comments of The State of New Jersey, Pinelands Commission* (describing the creation of the Pinelands National Reserve by act of Congress in 1978); *Comments of Tahoe Regional Planning Agency* (describing the creation of the Tahoe Regional Planning Agency by interstate compact negotiated between Nevada and California and ratified by

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[85] As stated in the NAB/MSTV Petition, according to the FCC's FM and TV engineering databases, there are currently 1,320 FM antennas, or 18% of the total number of FM stations, that are located at the same geographical coordinates as a least one TV antenna. *See* Petition, at 6 and Engineering Statement of Lynn Claudy, ¶ 19. Presumably, hundreds of these stations will have to be relocated as a consequence of the installation of DTV antennas.

[86] *Id.* at 8.

Congress in 1969).[87] These regional planning agencies have arisen either by direct federal action as a result of particular environmental concerns (in the case of the New Jersey Pinelands Commission) or as a result of Congressional approval of interstate agreements (in the case of the Tahoe Regional Planning Agency).

In order to clarify that the jurisdiction of these regional agencies is not preempted by the Commission's proposed rule, the New Jersey Pinelands Commission proposes that the proposed rule be amended to exclude restrictions that are the "result of federal legislation." NAB/MSTV agree that the Commission does not have authority to preempt restrictions which result from these federally-approved programs and believe that the amendment recommended by The Pinelands Commission should be adopted.

V. JURISDICTION

A number of the parties opposing Commission action in this proceeding argue that the Commission has no jurisdiction to preempt matters relating to local zoning and land use authority. Some commenters also argue that the proposed rule under consideration in this proceeding will violate the constitution. As shown below, and as the Commission appropriately concluded in its *Notice*, it has ample authority to adopt the proposed preemption rule. Moreover, the constitutional arguments raised by the opponents of Commission action either misconstrue relevant authority or rely on a mistaken perception of the scope of the proposed rule.

[87] The Comments of the Tahoe Regional Planning Agency refer to one other federally-approved regional agency -- the Columbia River Gorge Commission.

A. The FCC Has Jurisdiction To Preempt State and Local Obstacles To Broadcast Facility Construction

1. General principles

The preemption doctrine has its roots in the Supremacy Clause of the United States Constitution.[88] Under well-established principles, whenever the federal government acts, within its constitutionally-defined authority, to achieve its necessary purposes, it is empowered to preempt state laws and regulations. *See City of New York v. FCC*, 486 U.S. 57, 63 (1988). The preemption itself may be either express or implied. *See Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53 (1982); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (stating that preemption is "compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose"). Where Congress has not expressly provided preemptive statutory language, its intent nevertheless to supersede state law may be inferred. The United States Supreme Court has recognized at least two types of implied preemption, field preemption and conflict preemption. *See, e.g., Gade v. National Solid Wastes Management Ass'n*,

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[88] The Supremacy Clause, U.S. Const. art. VI, cl. 2 provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

505 U.S. 88, 98 (1992).

Under field preemption, state law is altogether nullified because:

> "'[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' because 'the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose.'"

Fidelity Fed., 458 U.S. at 153 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Under conflict preemption, in contrast, state law is superseded only to the extent that it actually conflicts with federal law. This conflict may be outright, *see, e.g., Free v. Bland*, 369 U.S. 663 (1962), it may arise because "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or state law may "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). *See also Michigan Canners & Freezers Ass'n v. Agricultural Marketing and Bargaining Bd.*, 467 U.S. 461, 469 (1984); *Felder v. Casey*, 487 U.S. 131, 138 (1988); *see generally Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986); *Fidelity Fed.*, 458 U.S. at 153; *Gade*, 505 U.S. at 98.

The Supreme Court has repeatedly stated that "[f]ederal regulations have no less pre-emptive effect than federal statutes." *Fidelity Fed.*, 458 U.S. at 153; *see also Capital Cities Cable*, 467 U.S. at 699; *Louisiana Pub. Serv.*, 476 U.S. at 369; *City of New York*, 486 U.S. at 63-64. It is only necessary that the federal regulations have been promulgated within the scope of the agency's

congressionally delegated authority for their preemptive effect to be complete. *See City of New York*, 486 U.S. at 63-64. Although one step removed from Congress's direct legislation, a "pre-emptive regulation's force does not depend on express congressional authorization to displace state law." *Fidelity Fed.*, 458 U.S. at 154. Indeed, the Supreme Court has been particularly solicitous of agency action in this regard: Courts are limited in their review of agency promulgation of regulations intended to preempt state law:

> "'If [the administrator's] choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'
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> . . . [M]oreover, whether the administrator failed to exercise an option to promulgate regulations which did not disturb state law is not dispositive."

Fidelity Fed., 458 U.S. at 154 (quoting *United States v. Shimer*, 367 U.S. 374, 381-82 (1961)) (other citations omitted); *see also Capital Cities Cable*, 467 U.S. at 699; *City of New York*, 486 U.S. at 64.

Under these well-established principles of the preemption doctrine, it is clear that the Commission has authority to adopt the proposed rule, or any other rule preempting state and local laws and regulations, so long as it acts pursuant to its congressionally delegated authority and fashions a reasonable accommodation of the conflicting federal and nonfederal policies. Although a number of commenters opposed to Commission action in this proceeding stress the peculiarly local nature of zoning,[89] *see, e.g., Warth v. Seldin*, 422 U.S. 490, 508 n. 18 (1975) (noting that "zoning laws and their provisions . . . are peculiarly within the province of state and local legislative

[89] *See, e.g.*, Comments of Concerned Communities and Organizations at 31-32; Comments of the City and County of San Francisco at 22; Comments of the National League of Cities et al. at 6.

authorities"), zoning is but a small subset of real property law and the Supreme Court has expressly stated that "[t]hese [preemption] principles are not inapplicable here simply because real property law is a matter of special concern to the States." *Fidelity Fed.*, 458 U.S. at 153; *see also Free*, 369 U.S. at 666 ("The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.").

2. The case law relied on by the opponents of Commission action is distinguishable

Several commenters suggest that certain case law constrains these general principles of the preemption doctrine.[90] These cases, however, have been misinterpreted, or selective quotations from them have been taken out of context. Because the Supreme Court does not rehearse every element of the preemption doctrine every time it treats preemption, it is crucial to identify the nature of the preemption at issue in any given case, as well as the source of the judicial precedent, in order to determine whether the discussion is holding or dicta. Thus, for example, although the Court in *Gregory v. Ashcroft* cautions that federal preemption in areas traditionally regulated by the states is "a power that we must assume Congress does not exercise lightly," *Gregory*, 501 U.S. at 460, at issue there was a state *constitutional* provision that the Court expressly noted was an area beyond that "traditionally regulated by the States; it is a decision of the most fundamental sort for a

[90] *See, e.g.*, Comments of the City and County of San Francisco at 22; Comments of the City of Dallas et al. at 12-13; Comments of the Commonwealth of Massachusetts at 2-4; Comments of the City of Philadelphia at 18; Comments of Arlington County, Virginia, et al. at 4. The principal cases these commenters rely upon are *CSX Transp., Inc. v. Easterwood*, 507 U.S. ----, 123 L.Ed.2d 387, 113 S. Ct. 1732 (1993); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992); *Gregory v. Ashcroft*, 501 U.S. 452 (1991); and *English v. General Elec. Co.*, 496 U.S. 72 (1990). These cases are distinguished below.

sovereign entity," *id.* Similarly, the "reluctan[ce] to find pre-emption," dicta in *CSX Transportation*, 123 L.Ed.2d at 396, occurs in a case involving both express and field preemption, not conflict preemption. In fact, while the oft-repeated notion that congressional intent to supersede state law must be "clear and manifest" originally appeared in *Rice v. Santa Fe Elevator*, 331 U.S. 218, 230 (1947), this precept applies, as *English* makes clear, when field preemption is at issue, not conflict preemption.[91] *See English*, 496 U.S. at 79. Because field preemption nullifies all state law, but conflict preemption nullifies only that in actual conflict with federal law, the Court has approached them differently. In any event, both field and conflict preemption arise by implication, not express language, and thus evidence of Congress's "clear and manifest" intent may be sought not only in the preempting law or regulation, but also in the structure, purposes, and subject matter of the statutes or regulations involved. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983); *Cipollone*, 505 U.S. at 545 (Scalia, J., concurring in the judgment in part).[92] It is thus necessary to establish the extent of the Commission's congressionally delegated authority to determine whether the Commission can, in fact, preempt state and local regulations affecting the siting of broadcast towers.

3. The Commission has been delegated broad authority over broadcast issues

The Communications Act of 1934 created the Commission for "the purpose of regulating

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[91] The phrase, but not the appropriate context, is repeated in *Cipollone*, 505 U.S. at 516, and *CSX Transportation*, 123 L.Ed.2d at 396.

[92] Justice Scalia has noted that the Court has not traditionally thought express statutory text necessary for a showing of "clear and manifest" intent. Indeed, in both implied conflict and field preemption circumstances, "we have had no difficulty declaring that state law must yield. The ultimate question in each case, as we have framed the inquiry, is one of Congress's intent, as revealed by the text, structure, purposes, and subject matter of the statutes involved." *Cipollone*, 505 U.S. at 545 (Scalia, J., concurring in the judgment in part) (citations omitted).

interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ." 47 U.S.C. § 151. Under 47 U.S.C. § 152(a), Congress directed the FCC to regulate all interstate and foreign communication by wire or radio. Communication by radio is expansively defined to comprise "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including *all instrumentalities, facilities, apparatus, and services* . . incidental to such transmission." 47 U.S.C. § 153(33) (emphasis added). Moreover, the Commission is empowered to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i); *see also id.* at § 303(r) (granting Commission general rulemaking authority over matters of radio communication).

From the start, and throughout its history, the Supreme Court has acknowledged that by the Communications Act, and through the Commission that it created, Congress had "formulated a unified and comprehensive regulatory system" for the broadcast industry. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940); *see also United States v. Southwestern Cable Co.*, 392 U.S. 157, 168 (1968). Given the nature of the science and technology upon which broadcasting relies, the Court has recognized that Congress necessarily vested the Commission with a broad grant of congressional authority to deal effectively and nimbly with changing circumstances:

> "Underlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors. . . . The Communications Act . . . expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission."

Pottsville Broadcasting, 309 U.S. at 138; *see also Southwestern Cable*, 392 U.S. at 172-73, 180; *FCC v. Midwest Video Corp.*, 440 U.S. 689, 696 (1979). The Court has previously analyzed the legislative history of the 1934 Act itself and concluded that the:

> "Commission was expected to serve as the single Government agency with unified jurisdiction and regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio. It was for this purpose given broad authority."

Southwestern Cable, 392 U.S. at 168 (internal quotations and citations to the legislative history omitted). The Court has repeatedly characterized the Commission's mandate as "comprehensive," with "not niggardly but expansive powers," and without being "stereotyp[ed]" to specific details. *See id.* at 173, 180; *see also National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943). Indeed, it well-settled that the Commission was delegated "broad responsibilities to regulate all aspects of interstate communication by wire or radio" and that its authority therefore "extends to all regulatory actions necessary to ensure the achievement of the Commission's statutory responsibilities." *Capital Cities Cable*, 467 U.S. at 700 (internal quotation marks and citations omitted).

In addition to the very broad enabling language, Congress has clearly manifested its intent to maintain federal control "over all the channels of radio transmission," 47 U.S.C. § 301; *see New York State Comm'n on Cable Television v. FCC*, 669 F.2d 58, 65 (2d Cir. 1982), and has directed the Commission "to encourage the larger and more effective use of radio in the public interest," 47 U.S.C. § 303(g); *see also National Broadcasting*, 319 U.S. at 219. Towards those ends, Congress has expressly determined that it shall be the federal government's official policy "to encourage the provision of new technologies and services to the public." 47 U.S.C. § 157(a). In fact, recently, in